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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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INTEREST OF THE AMICUS.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over three thousand seven hundred (3,700) state and local chambers of com-

* Consent of Respondent and Petitioner's letter stating its non-objection to the Chamber's filing of the instant brief have been filed with the Court.

merce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,-000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views in areas which significantly affect their rights and interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in cases raising significant Title VII** and related questions. *E.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Geduldig* v. *Aiello*, 417 U. S. 484 (1974); *DeFunis* v. *Odegaard*, ... U. S. ....., 40 L. Ed. 164 (1974); *Emporium Capwell Co.* v. *Western Addition Community Organization*, ... U. S. ....., 9 FEP Cases 195 (1975); *Albemarle Paper Co.* v. *Moody*, 74-389, argued April 14, 1975; *Liberty Mutual Insurance Company* v. *Wetzel*, No. 74-1245, petition for writ of *certiorari* granted.

The petition in this case raises significant questions involving the interpretation of Title VII and the severe dislocation which has resulted from the failure of the Equal Employment Opportunity Commission (EEOC or Commission) to properly administer and fulfill its responsibilities under that Act. Whether the EEOC may disregard and act contrary to the Congressional design and its own procedural regulations in the investigation, determination and conciliation of unfair employment practice charges because the Commission deems it "appropriate" to do so, and whether the EEOC's authority to bring suit is unrestricted by any statutory time limitation are questions which vitally affect the due process rights of not only the Chamber's members but every employer who is subject to the statutory reach of the Act. More important, these questions are representative of a basic problem—the EEOC's continual failure to adopt and adhere

** Title VII of the Civil Rights Act of 1964, as amended, 42 USC [Supp. II, 1972] § 2000e, *et seq.*; hereinafter referred to as "Title VII" or the "Act".

with predictability or regularity to administrative standards which conform to Congressional design. This failure has severely retarded the Commission's ability to implement the Congress' objective to the detriment not only of the due process rights of those charged with unfair employment practices, but the substantive rights of charging parties whom the Act is designed to protect as well.

Since, under the statutory scheme of Title VII, the EEOC is a mere investigator, conciliator and prosecutor, and not an administrative agency imbued with decision-making authority, the judiciary is charged with the responsibility of giving the Commission the proper guidance in its duties and responsibilities. Because of a division of view among the courts with respect to the issues presented here, there is an unsatisfied need on the part of all those charging parties who look to the Commission for relief as well as all those employers who seek to comply with the Act, to have a delineation of standards which govern the processing of unfair employment charges. Only this Court can satisfy that need.

ARGUMENT.

THE INSTANT CASE POSES SIGNIFICANT UNANSWERED QUESTIONS IN THE ADMINISTRATION OF TITLE VII WHICH SHOULD BE RESOLVED BY THIS COURT.

The petition in this case raises several questions involving the statutory interpretation of Title VII and the EEOC's failure, in the administration of the Act, to adhere to standards which comport with the Congressional design. Specifically, the Petitioner questions (1) whether §706(f)(1) of the Act imposes a limitation on the time within which the EEOC must administratively process and bring suit on an unfair employment practice charge;[1] (2) whether, in disregard of its own regulations designed to implement the Congressional policy making conciliation the paramount means of achieving Title VII compliance, the EEOC may ignore the conciliation process and institute suit;[2] and (3)

1. 42 USC [Supp. II, 1972] § 2000e-5(f)(1) provides in relevant part:

> "If within thirty days after a charge is filed . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . If . . . within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or . . . has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person . . . and within ninety days after . . . such notice a civil action may be brought against the respondent . . . by the person claiming to be aggrieved."

In the instant case, although the investigation of the charge was completed within seven (7) months, the Commission did not make a "reasonable cause" determination and seek to conciliate with the Company for another sixteen (16) months and did not bring the instant action until over three years after the charge had been initially filed. Petition at 5-6.

2. EEOC regulation § 1601.23, 29 C. F. R. § 1601.23 provides:

> "Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the *respondent shall be notified promptly, in writing that such efforts have been unsuccessful* and will not be resumed except upon the respondent's written request *within the time specified in such notice.*" (Emphasis supplied)

The notice required by § 1601.23 was never sent in this case. Rather, and even despite the fact that the L & N was cooperating with the EEOC conciliation officer in an effort to resolve the matter, in the midst of conciliation, the EEOC sent the charging party a "right to sue" letter advising him "that a satisfactory settlement had not been reached." App. 40, 68, 67.

3. Age Discrimination in Employment Act of 1967, 29 USC § 621, *et seq.;* hereinafter "ADEA."

4. Thus, whether the EEOC may disregard the notice requirement set forth in the Commission's regulations, § 1601.23, *supra,* has caused a divergence of view among the Fifth Circuit herein, the Eighth Circuit and the Sixth Circuit. See, *EEOC* v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (8th Cir. 1974) and *EEOC* v. *Kimberly-Clark Corp.*, ... F. 2d ....., 10 FEP Cases 38 (6th Cir. 1975).

Further, the EEOC appears regularly not only to fail to give this required § 1601.23 notice, but also to treat the whole conciliation process as a cursory matter, requiring it to make no more than a

whether, in view of contrary interpretations rendered under statutes in *pari materia,* the EEOC may disregard conciliation standards equally applicable under the administration of Title VII and the Age Discrimination in Employment Act.[3]

There are compelling reasons why these questions concerning the administrative procedures employed by the EEOC in implementing its statutory responsibilities should be considered by the Court.

First, the EEOC has failed to implement administrative standards and procedures for the proper administration of Title VII. The Commission has acted contrary to Congressional will and in a manner inconsistent with notions of procedural fairness and regularity. Indeed, the specific questions concerning the agency's practices and the lack of standards complained of by the Petitioner herein are not unique. They arise with regularity and have engendered conflicts among the district and circuit courts.[4]

Second, the statutory scheme of Title VII charges the judiciary not merely to oversee but affirmatively to shape the development of the Commission's administrative procedures in carrying out its responsibilities. Thus, unlike the National Labor Relations Act, which empowers the NLRB to prevent unfair labor practices by means of cease and desist authority and which provides only for appellate enforcement and review of the Board's decisions,[5] Title VII authorizes the EEOC only to investigate and prosecute. The judiciary must determine in the first instance whether there has been a violation of the Act.[6] Since, under Title VII, the Commission must investigate a charge, make a "reasonable cause" determination based on that investigation, and attempt to conciliate as prerequisites to bringing suit, whether these administrative steps have been taken in conformity with the Congressional intent and with the EEOC regulations and whether the Act places any time-bar on the Commission's authority to bring actions must be determined by the courts.[7] The Commission's failure to adopt standards of fairness or even to adhere to its own regulations at the administrative level severely impacts upon the rights of those charged with violations of the Act.[8] Because of this impact, set forth more fully below, and because of the division and disarray among the district and circuit courts in providing guidance with respect to the administrative and procedural issues presented herein, there is a need for resolution of these issues by this Court.

perfunctory effort at settlement. This practice has been severely criticized by the lower courts as depriving EEOC respondents of procedural fairness at the most important stage of the administrative proceeding. *EEOC* v. *Firestone Tire & Rubber Co.*, 366 F. Supp. 273 (D. Md. 1973); *EEOC* v. *Wastvaco Corp.*, 372 F. Supp. 985 (D. Md. 1974); *EEOC* v. *McLean Trucking Co.*, ... F. Supp. ....., 7 FEP Cases 302 (W. D. Tenn. 1974); *EEOC* v. *Western Electric Co.*, 364 F. Supp. 188 (D. Md. 1974); *EEOC* v. *Raymond Metals*, 385 F. Supp. 907 (D. Md. 1974); *EEOC* v. *U. S. Pipe & Foundry Co.*, 375 F. Supp. 237 (N. D. Ala. 1974).

Contrary to the view taken by the Fifth Circuit hereinbelow, permitting the EEOC to avoid serious conciliation efforts under Title VII, the Eighth Circuit has refused to allow the Labor Department to engage in similar derelections when an employer is charged with age discrimination as opposed to race, sex, religious or national origin discrimination. *Brennan* v. *Ace Hardware Co.*, 495 F. 2d 368 (8th Cir. 1974). Whether, in view of the primacy placed upon conciliation by Congress under both Title VII and the ADEA, conflicting standards may continue to be employed in the administration of the nation's antidiscrimination laws, is an issue which should be resolved by this Court.

Finally, despite the fact that this Court has once declined to consider whether § 706(f)(1) imposes a time limitation within which the EEOC must investigate a charged violation of the Act, seek to conciliate and bring suit, *EEOC* v. *Cleveland Mills*, 502 F. 2d 153 (4th Cir. 1974) *cert. denied*, ... U. S. ..... (1975), it is an issue which has been widely litigated, has divided the district courts, and caused Judge Moore to dissent below. See, *EEOC* v. *Kimberly-Clark*, *supra*, at n. 5 and cases cited therein. See also, dissent of Judge Moore in the instant case. For the reasons set forth in part B of the Chamber's brief, whether the Act grants the EEOC the right to bring suit *in perpetuity* is an issue which severely impacts upon the administration of the Act, affecting the rights of respondents and charging parties as well, and should be considered by this Court.

5. National Labor Relations Act, as amended, 29 USC § 160 (a), (e) and (f).

A. The EEOC Has Failed to Implement Standards and Procedures for the Proper Administration of Title VII.

The instant case demonstrates the EEOC's failure to adhere to standards of fairness and due process at virtually every stage of the administrative proceeding. Consideration of the EEOC's

6. § 706f(1)-(5), 42 USC [Supp. II, 1972] § 2000e-5f(1)-(5).

7. The statutory scheme of the act authorizes the district courts, as trial courts, to engage in direct review of the sufficiency of the EEOC administrative steps leading up to civil action. See *EEOC* v. *U. S. Pipe & Foundry Co.*, *supra*; *EEOC* v. *Western Electric Co.*, *supra*; *EEOC* v. *du Pont Co.*, 373 F. Supp. 1321 (D. Del. 1974).

8. This Court has held that agency rules must be scrupulously observed where they are intended to confer important benefits upon individuals. *American Farm Lines* v. *Black Ball Freight Service*, 397 U. S. 532, 538-9 (1970). Here, among other derelictions catalogued in part A of the Chamber's brief, the EEOC failed to give the Petitioner the notice required by § 1601.23 of its regulations, a rule specifically designed to afford EEOC respondents a final opportunity to resolve the charge prior to litigation. See, *e.g.*, *EEOC* v. *Firestone Tire & Rubber Co.*, *supra*; *EEOC* v. *Western Electric Co.*, *supra*; *EEOC* v. *Hickey-Mitchell Co.*, *supra*.

conduct with respect to the issues raised by Petitioner here confirms the EEOC's failure to conform its standards and procedures with the design of Congress.

Since the Act follows a progression from investigation to "reasonable cause" determination, conciliation and court action, it is appropriate to proceed to examine the EEOC's conduct in that order.

1. Investigation and the "Reasonable Cause" Determination.

Section 706(b) of the Act[9] provides in relevant part:

> "Whenever a charge is filed . . . the Commission . . . *shall make an investigation thereof* . . . If the Commission determines *after such investigation* that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action . . . If the Commission determines *after such investigation* that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference conciliation, and persuasion." (Emphasis supplied)

Here, the Commission completely failed to adhere to the mandate requiring it make its "reasonable cause" determination on the basis of an investigation of a charged violation of the Act. The practices over which the Commission found "reasonable cause" were not even alleged in the charge under investigation. They were not even investigated, nor was the Petitioner given an opportunity to present any evidence concerning those practices prior to the Commission's determination.

Ben Thomas, a black man, who filed the EEOC charge which led to this proceeding, was discharged by the L & N for falsifying his employment application with respect to questions concerning prior injuries and his involvement in lawsuits. (App. 59) After an investigation, the EEOC's District Director determined that Thomas' race was *not* a factor in his discharge. (App. 60) The Commission adopted its Director's conclusion that Thomas had *not* been discharged because of his race. Nonetheless, without the benefit of a charge and without the evidentiary results of an investigation into the L & N's pre-employment use of testing or arrest record information, the EEOC concluded that there was "reasonable cause" to believe that those practices violated the Act! (App. 39)[10]

9. 42 USC [Supp. II, 1972] § 2000e-5(b).

Thus, the EEOC's "reasonable cause" determination, its subsequent conciliation demand and the instant suit were a result here not of an evidentiary investigation, but were based on a presumption of guilt growing out of a charge which it found to have no merit and which it dismissed.

This practice is not unique. It is a consequence of the Commission's use of presumptions rather than evidence in the investigation of charges, the failure to adhere to a meaningful and consistent standard of what constitutes "reasonable cause" and a propensity to use isolated charges as a springboard to launch a search into every possible employment practice in order to uncover some violation of the Act.[11] Thus, William A. Carey, former EEOC General Counsel, admitted before the House Subcommittee on Equal Opportunities, that prior to the 1972 amendments granting the EEOC prosecutorial power—when

10. In this regard, it is interesting to note that the only two persons ever discharged by the Company for falsifying the arrest record inquiry were white. (App. 64) The Commission found no evidence that any blacks or whites had ever been refused employment because of a prior arrest record. Moreover, had the EEOC given the L & N an opportunity to present evidence on this issue prior to making its determination, it would have learned that the arrest inquiry had been discontinued in 1970. The Commission issued its "reasonable cause" determination on January 28, *1972*. (App. 56, 63-66)

Similarly, the Commission found no evidence to suggest that any applicant had been denied employment as a result of the use of pre-employment tests as administered by L & N.

11. See e.g., *EEOC* v. *Western Electric Co., supra; EEOC* v. *Westvaco Corp., supra; EEOC* v. *McLean Trucking Co., supra.*

the instant "reasonable cause" determination was made—the Commission employed a *lower* standard to determine "reasonable cause" than it would have employed had the agency had to go to court to enforce its determination.[12] Further, it is not altogether clear whether the difference in standards has been eliminated today.[13] Moreover, former EEOC Chairman Powell told the Committee that it was, and continues to be, the Commission's policy to investigate charges "broadly encompassing non-alleged as well as alleged violations, issues, etc,"[14]

Under a charge-based system such as Title VII, it is neither efficient nor appropriate for the Commission to engage in a broad range purge of all possible or imagined violations of the Act,[15] particularly where, as here, the EEOC, acting in disre-

12. Testimony of William A Carey. *Hearings Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor,* held on September 17-19, 1974 (G. P. O. 1975) at 43; hereinafter *"Hearings"*.

13. Testimony of Mr. Carey in response to Congressman Hawkins, *Id.,* at 44.

14. Mr. Powell reported that prior to August, 1973, it was the Commission's policy to expand the scope of the investigation of *all* charges filed with it, but that after that date this policy was discontinued where there is only one charge pending against a respondent. *Hearings, supra,* at 33. However, Chairman Powell further reported to the Committee that the Commission is currently developing a *standardized* "request for information" *package* to be used in the investigation of charges, *Hearings, supra,* at 34, which by definition must inquire into areas unrelated to specific charges, and the Chamber's members report that expansion of charges into broad-based investigations, requiring them to supply mountains of data unrelated to the particular charge under investigation, is the rule rather than the exception. See Statement of Homer L. Deakins on behalf of the Chamber, *Hearings, supra,* at 185, *et seq.*

15. Indeed, the Act itself, through the mechanism of the Commissioner's charge, prescribes a statutory means for the Commission to investigate a broad range of practices where, as a result of a number of individual charges, or based on an examination of EEO-1 reports, or upon other independent evidence, an EEOC Commissioner is given "reasonable cause to believe" that an employer might be engaged in broad-based violations of the Act. See *New Orleans Public Service, Inc.* v. *Brown, et al.,* 507 F. 2d 160 (5th Cir. 1975). Here, however, the Commission had before it one individual

gard of the literal mandate of § 706(b), made the determination to do so without any evidentiary basis and without even giving the employer the opportunity to disabuse the agency of its presumption of guilt. Such practices themselves smack of a denial of administrative due process, yet their consequences are more keenly felt at the "conciliation" stage where the employer is then called upon to eliminate the employment practices so determined by the Commission to be violative of the Act.

2. Conciliation.

Section 706(b) of the Act provides that if the Commission finds "reasonable cause", it "*shall* endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation and persuasion." (Emphasis added) This directive is mandatory, requiring the Commission's most serious efforts at resolution since conciliation is the cornerstone of the Act.[16]

Here, however, the Commission has disregarded the Congressional mandate as well as its own regulations requiring it to make serious efforts at conciliation.

charge which it dismissed and no evidence to support its finding that any other L & N practice might have violated the Act.

16. See, *e.g., EEOC* v. *Hickey-Mitchell, supra; EEOC* v. *U. S. Pipe & Foundry, supra; EEOC* v. *Westvaco Corp., supra; EEOC* v. *Firestone Tire & Rubber Co., supra; EEOC* v. *Western Electric Co., supra; EEOC* v. *Raymond Metals, supra.*

In giving the EEOC prosecutorial power, Congress reaffirmed its statutory directive that the Commission utilize its most serious efforts to seek conciliation. Congressman Perkins, the House sponsor of the bill to give the Commission the authority to bring suit, stated:

> "The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. *Only if conciliation proves to be impossible* do we expect the Commission to bring action in Federal district court to seek enforcement." 118 Cong. Rec. 7563 (1972). (Emphasis added)

See also, similar remarks of Senators Dominick, 118 Cong. Rec. 120, 170 (1972) and Williams, 118 Cong. Rec. 3461 (1972).

Here, the Commission, after presenting the Petitioner with a "boiler-plate" proposed conciliation agreement, simply abandoned all efforts at actual conciliation, failed to give the notice required by § 1601.23 of its rules, peremptorily notified the charging party that a satisfactory settlement had not been reached,[17] and thereafter, brought suit. The EEOC's pattern of conduct here is not dissimilar from other cases.[18]

Conciliation, meaningful and not perfunctory, including the requirement that an EEOC respondent be given the opportunity to settle contemplated by § 1601.23, is mandated by statute and agency rule. The Labor Department, in administering charges of age discrimination under the ADEA, is directed to engage in genuine settlement efforts as a jurisdictional prerequisite to the institution of court action. *Brennan* v. *Ace Hardware Co., supra.* The Congressional emphasis on meaningful conciliation is the same under both the ADEA and Title VII. Indeed, both the literal language of Title VII and the ADEA and the Congressional debates confirm the similitude between the two acts in this regard. Thus, § 706(b) of Title VII states that the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion" and § 706f(1) requires conciliation as a pre-condition to suit.

The language of § 706(b) and the requirement of § 706(f)(1) is virtually identical to § 7(b) of the ADEA, 29 USC § 626(b), which provides:

> "Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion."

Moreover, Congressman Perkins' statement as to the Congressional intent with regard to conciliation under Title VII[19] is

17. App. 40, 67-68.
18. See cases cited at fn. 16, *supra.*
19. See fn. 16 of the Chamber's brief, *supra.*

echoed by the statements of legislative design under the ADEA. Thus, the House Report states:

> "It is intended that the responsibility for enforcement vested in the Secretary by section 7, be *initially and exhaustively* directed through informal methods of conciliation, conference, and persuasion and *formal methods applied only in the ultimate sense.*" House Rept. No. 805, 90th Cong., 1st Sess., U. S. Cong. & Adm. News 2213, 2218 (1967). (Emphasis added)

Similarly, Congressman Reid in the House debate on the ADEA pointed out the importance attached to serious conciliation efforts:

> "This approach *emphasizes* conciliation, conference and persuasion *before* permitting the Secretary of Labor to move directly to the U. S. district courts in a civil action." 113 Cong. Rec. 34745 (1967). (Emphasis added)

Because of the clear Congressional focus on the development of non-judicial remedies under both Title VII and the ADEA and the emphasis placed upon conciliation as the means for achieving compliance with these acts, the incompatibility of standards which now exists as a result of the decision below requires rectification by this Court.

3. The Authority to Bring Suit.

In his dissent below, Judge Moore stated that § 706(f)(1), by its express terms, sets forth an orderly progression for the processing of unfair employment charges through and including the filing of an EEOC action within 180 days (six (6) months), leaving the charging party a private right to sue should the Commission choose not to do so.[20] The limitation urged by Judge

20. § 706(f)(1) provides in pertinent part:
> "If within thirty days after a charge is filed . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . If . . . within one hundred and

Moore, as well as other judges who have confined the Commission's right of action to 180 days,[21] promotes Congressional emphasis on conciliation and the statutory scheme which seeks to avoid duplicative lawsuits by providing for EEOC intervention should the charging party bring an action, or by the charging party should the EEOC bring an action.[22] Thus, conciliation, the Congressionally preferred means of implementing the Act, is rendered effective because an EEOC respondent is aware that failure to settle will result in imminent litigation. Multiple, lengthy or avoidable lawsuits which are contrary to the design of the Act are avoided by the imposition of the logical limitation contained in § 706(f)(1).

Here, the Commission did not bring the instant action until *thirty-seven* (*37*) months after the administrative charge was filed. The Commission argues that once a charge is filed, it never loses its authority to bring suit; that the Act permits the Commission to retain the right to sue in perpetuity, subject only to the ninety (90) day period within which the charging party may exercise his right to bring private action. According to the Commission, its right to sue "reverts" back if the charging party fails to bring his own action.[23] The Commission's con-

> eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or . . . has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person . . . and within ninety days after . . . such notice a civil action may be brought against the respondent . . . by the person claiming to be aggrieved."

21. *E.g., EEOC* v. *General Dynamics Corp.*, 382 F. Supp. 59 (N. D. Tex. 1974); *EEOC* v. *Union Oil Co. of California*, 369 F. Supp. 579 (N. D. Ala. 1974).

22. § 706(f)(1).

23. The Commission formerly took the position that its right to bring action co-existed along with that of the charging party during the statutory ninety (90) day period within which the charging party may bring his own suit. However, this interpretation of its authority has been rejected as being contrary to the Congressional prohibition against duplicative lawsuits, *EEOC* v. *Missouri Pacific R. R. Co.*, 493 F. 2d 71 (8th Cir. 1971), and the Commission now seeks to gain acceptance of the "reverter" theory urged herein in order to retain its right to sue *ad infinitum*.

struction of the Act places an anomolous "zigzag" in the otherwise orderly and efficient procedure established for administering and enforcing Title VII. The Commission's theory vitiates the Congressional emphasis on conciliation and permits multiple lawsuits. Any incentive which the most recalcitrant or even a cooperative employer has in conciliating a Title VII charge is removed by the Commission's view of the Act. Thus, a recalcitrant employer, knowing he is under no time limitation to settle, has no pressure to come to terms with the Commission or charging party. He can "wait out" the ninety (90) day period within which the charging party may exercise his right to sue and then challenge the EEOC if and when it decides to bring action. An employer who desires to settle all accounts with both the charging party and the EEOC is forced to deal separately with the charging party should he exercise his right to sue and then, perhaps, years after the charge has been filed, as in this case, resume conciliation or defend against an EEOC action.[24] The Commission's approach emphasizes litigation rather than conciliation and allows, if it does not affirmatively encourage, duplicitous lawsuits, contrary to the efficient and effective implementation of the Act.

The Court should grant the petition herein to determine whether the Commission's interpretation of its authority is contrary to the Congressional intent which underlies Title VII.[25]

24. *EEOC* v. *Kimberly-Clark Corp., supra,* and *EEOC* v. *Huttig Sash & Door Co.*, ... F. 2d ....., 10 FEP Cases 529 (5th Cir. 1975) wherein the Sixth and Fifth Circuits recently held that despite the filing of private actions by the charging parties, the Commission might nonetheless bring its own action where it alleges practices uncovered in the investigation of the charge other than those sued upon by the charging party in his private action.

25. The instant case, as well as the other examples cited herein, demonstrate that the Commission's delay in bringing suit well past 180 days is the rule rather than the exception. These delays adversely impact upon employers who desire prompt resolution of the charges made against them and who continue to incur potential back-

B. Affected Employers and Employees Need to Have These Issues Resolved.

The impact of the EEOC's failure to follow standards, procedures and time limitations which would result in the effective and efficient implementation of the Act, is borne out by a backlog of EEOC charges exceeding 97,000,[26] 90% of which are in the investigative and pre-investigative stages.[27] Moreover, 90% of the cases investigated and transmitted to the General Counsel for litigation have been rejected because of the quality of the investigations.[28]

Translated into human terms, these figures mean that those who seek relief from the Commission are not getting it, and employers charged with violations of Title VII are not receiving thorough and fair treatment at the administrative level.[29]

pay liability until the issue of liability is determined by the courts. In *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258 (1969) this Court felt that this consideration was sufficient to warrant review of an NLRB failure, because of administrative delay, to promptly resolve an unfair labor practice matter. While the Chamber disagrees that the result reached in *Rutter-Rex* is appropriate here because of the difference between the authority granted the Board under the NLRA and that granted the Commission under VII, the Chamber contends that the same considerations which warranted review by this Court in *Rutter-Rex* compel that *certiorari* be granted in this case to review not merely a single instance of administrative delay but a practice of delay which has become the rule with the EEOC.

26. Statement of Chairman Powell, *Hearings, supra* at 31.

27. *Id.*, at 40.

28. *Id.* at 42-44.

29. Close observers of the Commission have commented upon its inability to implement its statutory charge and the necessity for some direction to be given it. Thus, Professor Blumrosen, formerly Chief of Conciliations with the EEOC, has observed that "the moment of opportunity for administrative implementation of the well-developed law of equal employment opportunity is slipping through our fingers. Bureaucratic inertia and a propensity to burden the courts to an unconscionable degree are operating today." A. W. Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy*, 49 Notre Dame L. 46, 58 (1973). Indeed, this result was foreshadowed in an

As indicated by the General Counsel's rejection rate and his admission that a different standard of judging "reasonable cause" is utilized at the administrative level than would be permitted in court, employers are required to conciliate "violations" which could not be maintained in a suit. Thus, the instant case, where the Commission found "reasonable cause" to believe an arrest record inquiry never shown to have adversely impacted upon minorities and *not even in use* when the determination was made, is not atypical of the Commission's practices.[30] Further, it is small wonder that conciliation is often unproductive when employers are required to remedy "violations" which the Commission could not even bring to court for enforcement. Finally, the Commission's need to develop such tortured theories as a "re-

earlier observation made by Professor Blumrosen wherein, in commenting upon the Commission's view of its own responsibilities, he noted that the EEOC, at the outset, embarked upon a course of "creative interpretation" of the law; viewed the legislative history of the Act not as a guide but as an outer limit; and apparently based this view on the premise that the courts "were available to prevent serious error" and might sustain the EEOC's interpretation of Title VII "partly out of deference to administrators." Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 Geo. Wash. L. Rev. 695, 703 (1970). As Professor Blumrosen observed in his later article, *Crossroads*, the Commission's course of conduct has continued to the present, necessitating direction for the effective implementation of the Act.

While the Chamber does not endorse or share all of Professor Blumrosen's recommended means for effective implementation of the Act set forth in his later article, we agree with his view that the Commission is not functioning efficiently and that there is a need for direction and guidance from the courts.

30. There are, in addition to those repetitious instances of conduct challenged by Petitioner herein, many other EEOC practices indicative of the Commission's present course. Illustrative are the Commission's refusal to answer interrogatories propounded to it during the course of litigation, *EEOC* v. *Los Alamos Constructors, Inc.* 382 F. Supp. 1373 (D. N. M. 1974); its attempts to maneuver the scope of litigation to include new matters upon which it did not even make a "reasonable cause" finding or seek conciliation, *EEOC* v. *du Pont Co., supra;* and its efforts to bring suit against parties with whom conciliation was never even sought, *EEOC* v. *U. S. Pipe & Foundry, supra.* EEOC respondents, many of whom do not have the resources to challenge the Commission's processes, need to know whether such practices as these and those challenged herein will continue to employed.

verter" authority to bring suit is apparent when one considers that it has over 97,000 charges in backlog over which it desires to retain the right to sue when those charges are ultimately "investigated."

Employers and charging parties alike need to know whether the Commission will be required to efficiently and fairly implement its statutory responsibility. The Court should grant *certiorari* to resolve the issues presented herein and satisfy that need.

CONCLUSION.

For the reasons set forth herein as well as those urged by Petitioner L & N, the Chamber respectfully prays that the Court grant *certiorari* to review the questions presented by the petition.

Respectfully submitted,

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